

**IN THE MATTER OF ARBITRATION  
BETWEEN**

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**MINNESOTA STATE COLLEGES AND  
UNIVERSITIES,**

**Employer,**

**and**

**MINNESOTA STATE COLLEGE FACULTY,  
UNION.**

**ARBITRATION DECISION  
AND AWARD, (hiring practices)**

**Case Numbers:**

MSCF-10-03 and MnSCU-10-0065  
MSCF-11-04 and MnSCU-11-0069  
MSCF-12-06 and MnSCU-12-0044  
MSCF-13-15 and MnSCU-13-0068

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Arbitrator:

Andrea Mitau Kircher

Date and Place of Hearing:

February 10, and April 1, 2014  
Education Minnesota Building  
St. Paul, Minnesota

Date Record Closed:

May 12, 2014

Date of Award:

June 10, 2014

**APPEARANCES**

For the Union:

Jess Anna Glover  
Attorney for MSCF  
Education Minnesota  
41 Sherburne Avenue  
St. Paul, MN 55103-2196

For the Employer:

Jeffrey O. Wade  
System Director Labor Relations  
Office of the Chancellor, MnSCU  
30-7<sup>th</sup> St. E., Suite 350  
St. Paul, MN 556101-7804

**INTRODUCTION**

The Minnesota State Colleges and Universities System (hereafter, “System” or “Employer”) is one of two Systems of public higher education in the state of Minnesota (the other is the University of Minnesota). The MnSCU System has 31 institutions with 54 campuses located in

47 Minnesota communities that serve more than 430,000 students.<sup>1</sup> Over four years, 2010-2013, the Minnesota State College Faculty (“MSCF” or “Union”) filed four grievances under the 2009-2011 collective bargaining agreement (“CBA” or “Contract”) between it and the Employer objecting to the Employer’s administration of Article 20, Section 7, “Hiring Practices”. The parties agreed that these grievances should be heard and decided together. Under Article 27 of the CBA (Joint Ex. 1), unresolved disputes arising under the CBA are subject to arbitration, and the parties do not dispute the arbitrator’s jurisdiction to decide this matter.

Initially, the hearing was scheduled February 10, 2014. The parties spent the day in conference trying to resolve this case but were unable to reach agreement, and the matter was rescheduled for hearing on April 1, 2014. At that time, the parties presented documentary evidence and testimony under oath subject to cross-examination. The testimony was recorded and transcribed by Court Reporter, Colleen M. Sichko, Shaddix & Associates. Written briefs were received from the parties May 12, 2014, whereupon the record closed.

## **ISSUE**

Did the Minnesota State Colleges and Universities violate Article 20, Section 7 of the collective bargaining agreement between the parties? If so, what is the proper remedy? (Issue agreed upon by the parties.)

## **RELEVANT CONTRACT LANGUAGE**

### **Article 20 Appointments and Credential fields**

Section 7. Hiring Practices. The Employer will insure that the System employs no less than seventy percent (70%) of the FYE MSCF bargaining unit ten (10) faculty as unlimited full-time faculty and that each state college employs no less than sixty percent

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<sup>1</sup> Online description through Google.

(60%) of the total FYE MSCF bargaining unit ten (10) faculty as unlimited full-time faculty as calculated below.

Subd. 1. Calculation of UFT Positions Needed. The basis for calculating the number of unlimited full-time faculty positions required at each college will be as follows:

- A. No later than February 15 of each year, the Employer shall provide the MSCF with a report of total MSCF bargaining unit employment at all technical colleges, community colleges and comprehensive community colleges for the current year. This report will include all credit assignments, including overload during the academic year, activity credits, and fifty percent (50%) of the concurrent enrollment, provided by full-time and part-time faculty regardless of bargaining unit eligibility. It shall include all persons who are paid wages by the college or System regardless of funding source.
- ...
- B. The work that is done by temporary faculty members who are hired as replacements for sabbatical leaves and for MSCF release time shall be subtracted from the total at each college.
- C. The hiring practices requirement of seventy percent (70%) state-wide and sixty percent (60%) at each college shall be established by multiplying the total MSCF employment as described above times 0.70 and 0.60 and rounded to the nearest whole number. If the rounding down causes the percentage to go below seventy percent (70%) and sixty percent (60%), the number will be rounded up.

Subd. 2. Verification of Rosters. The unlimited full-time faculty roster as of February 15 shall include all instructors, counselors and librarians with the exception of new unlimited part-time faculty after July 1, 1987. No later than March 15 of each year, the Office of the Chancellor and the MSCF shall jointly produce an analysis of the unlimited full-time MSCF faculty employed at each technical college, community college and consolidated community college for the current academic year. The analysis will examine each college. Customized Training faculty members as defined in Article 28 shall not be included in this analysis.

- A. Faculty who have been terminated for cause or have been non-renewed as of February 15 shall be subtracted from the total. Any faculty member who is on an unpaid leave of absence to serve as a MnSCU administrator for more than three (3) years shall also be subtracted from the total.
- B. The difference between the number of unlimited full-time faculty currently employed at each college as of February 15 and respective of deletions indicated above and the number needed to insure seventy percent (70%) and sixty percent (60%) as established in Subd. 1, paragraphs A and B above shall be the minimum number posted and hired. The posting of the required number of unlimited full-time positions needed to be in compliance with the hiring practices above shall occur no later than March 31, to allow for filling at the start of the next academic year. It is the intent of this section to provide

compliance by the beginning of the next academic year. The Office of the Chancellor and the MSCF will meet no later than May 1 to assure that the number of positions posted will bring the colleges into compliance.

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When special circumstances exist and agreement is reached between the MSCF and the Chancellor, terms of this subdivision may be waived or altered.

MSCF Master Agreement MnSCU 2009-2011, Joint Ex. 1. (Emphasis provided.)

## **FACTS**

A master agreement between the parties has been in effect for many years. This dispute concerns interpretation and administration of Article 20, Section 7, “Hiring Practices”. The hiring practices language memorializes the Employer’s agreement to share with the Union some of its authority to hire faculty employees; that is, the Employer agrees, *inter alia*, that it will employ no less than 70% of the total bargaining unit faculty as unlimited full-time employees. An unlimited full-time employee is one with a full time assignment for an academic year that “carries the assumption that such employment will continue on a full-time basis in subsequent years.” Jt. Ex. 1 at Art. 2 and Art. 20, Sec. 2. The employee’s status is similar to a tenured position. Testimony (“T.”) Kari Ann Cruz, Tr. at 14. Certain benefits are available to unlimited full-time (“UFT”) faculty that are not available to those with lesser status, such as temporary faculty who may work full time. T. Cruz, Tr. at 15.

The Hiring Practices language sets out a process for calculating the Employer’s compliance with the expectation that it will employ no less than 70% unlimited full-time employees. In March 2010, 2011, 2012, and 2013, the Union filed grievances alleging that the Employer had failed to meet the contractual requirement of 70% statewide UFT faculty as required by Section 7. Joint Ex. 3. The parties have been unable to agree to remedies for these grievances, and the purpose of this arbitration is to consolidate and resolve them.

It is undisputed that the Employer failed to hire sufficient UFT faculty in 2011 to reach the 70% target for that school year. According to the System Director of Finance, Susan Anderson, the hiring goal for UFT employees could not be met, because student enrollment increased suddenly and substantially while state appropriations to the System decreased because of declining economic conditions. Under the circumstances, the Employer believed it was faster to staff with temporary employees to fill the immediate need, enabling it to meet its obligation to provide enough faculty to teach the influx of students.

In each of the four grievances filed, the Union sought the same remedy. As set out in the Union's post-hearing brief, the Union requests an order requiring the Employer to immediately post and hire a total of 68 faculty into unlimited full time positions. These employees may be any combination of current faculty working in temporary positions or new hires. Data demonstrates, for example, that in the Employer's five largest institutions, close to 100 temporary faculty employees were teaching full time hours for the years 2011, 2012, and 2013. Testimony, Kari Ann Cruz, MSCF Field Staff, and Union Ex. 2.

The Employer, while admitting its failure to meet the percentage goal for 2011, seeks to mitigate the requested remedy in a number of ways. It contends that it is currently in compliance, and that if a remedy is granted now for 2011 remedial "hiring"<sup>2</sup> should be spread out over a period of years, or credit should be given for hiring more than the minimum number of UFT faculty since 2011, or that the total number required to be "hired" should be only 46 UFT rather than 68, as explained further below.

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<sup>2</sup> As used in this opinion, the term to "hire" means both hiring new UFT faculty employees and converting temporary employees to UFT positions.

## **UNION POSITION**

The Union argues that MnSCU violated the Master Agreement when it failed to hire 68 UFT faculty in 2011. The Union argues that the correct remedy is to require the Employer to hire 68 UFT faculty employees, despite the Employer's calculation that the correct number to hire, if any, should be 46. A total of 46 UFT hires under the formula means that the Employer would be allowed to count as part of its 70% goal, posted UFT positions at the time of posting for a job rather than at the time of actually hiring. The Union argues that contract language requiring employment of 70% UFT faculty does not mean counting posted job openings, but actually filling the UFT positions with employees.

Even though the Employer is currently in compliance with the hiring practices language, the Union contends that without the requested remedy, the language will be rendered meaningless, allowing the Employer to hire UFT faculty only when the number of students enrolled and the amount of appropriations reach a convenient balance, rather than meeting the goal annually. The Union argues that the remedy it seeks is not an expensive or impossible one for the Employer to absorb. Because the same student/faculty ratio will exist before and after the remedy, the Union argues, the body of work does not change; currently, the work is being done, but it is being done by faculty in a different job status. Nor, the Union contends, will this remedy create large costs, because the salary is the same for temporary faculty as for UFT faculty. The only different cost is potential liability for benefits that might be owed UFT faculty who might be laid off at a later date. Temporary faculty members do not have layoff benefits. The Union argues that the Employer failed to hire the minimum number of UFT faculty, and the remedy must be for it to hire faculty with that status beyond their compliance with the language for fiscal year 2014.

## **EMPLOYER'S POSITION**

The Employer contends that it was in compliance with the CBA in Fiscal Year 2010, 2012 and 2013. It admits it was not in compliance in 2011. The Employer argues that the remedy sought by the Union is impractical, unnecessary, and likely to cause many difficulties if implemented as the Union requests. The Employer points out that the Union's evidence regarding temporary employees working full time is misleading in that important facts are missing from the data in the hearing exhibits. For example, the exhibits do not list the employees' "credential fields", or the campuses at which they teach. Some temporary employees may teach at multiple campuses and sites and in overlapping time frames. Another stumbling block to simply converting temporary faculty to full time status is that UFT faculty are traditionally hired only after an extensive search process and may be required to meet higher levels of education and work experience than temporary faculty. The Employer argues that remedial jobs offered must each be sustainable. It is not reasonable to hire 68 extra UFT faculty members unless it is clear they are needed. Even though the Employer has authority to remove probationary UFT employees and lay off UFT employees to meet the remedial UFT hiring goal, taking such actions will harm the System's reputation and create hardships for employees and their families who come to the school with expectations of unlimited full-time employment. In other words, the Employer argues that it may be statistically possible to cope with the remedy requested, but it would be bad policy and difficult to locate appropriate current and future employees to fill so many remedial positions in one year.

Alternatively, the Employer argues that the remedy should be limited in one or more ways. First, the System should be given credit for UFT employees over the 70% minimum, hired during the other years in dispute. Second, the remedy should be imposed over a period of

years, rather than in one year, and third, the total number of UFT faculty it was short in 2011 was not 68, but 46 as calculated by the Employer based on postings for the jobs.

## **DISCUSSION AND DECISION**

Arbitrators typically resolve disputes concerning the interpretation of a collective bargaining agreement by using a sequential analysis to ascertain the intent of the parties. First, the arbitrator looks to the language of the Contract. If it is clear and unambiguous, that language should control. If that is not the case, the arbitrator should look to other indicia of the parties' intent. Among the indices that are relevant are bargaining history and past practice. See Elkouri & Elkouri, How Arbitration Works Ch. 9 (5<sup>th</sup> ed. 1997).

This dispute concerns the appropriate interpretation of the "hiring practices" language of Article 20, Section 7. The parties agree that the Employer must ensure that for each academic year the faculty is composed of at least 70% unlimited full time employees. Subdivision 7 sets out a method of calculation and communication. Yet, it does not specifically require communication from the Employer to the Union at the beginning of the academic year verifying compliance. Section 7 sets up some communication deadlines. The Employer is to report to the Union in February (subdivision 1) and in March (subdivision 2), and it has done so. The Contract also provides that the Employer and the Union are to meet "no later than May 1 to assure that the number of positions posted will bring the colleges into compliance". Art. 20, Sec. 7, Subd. 2 B. This is a rather vague provision. The Employer has interpreted the language to mean that if it posts sufficient UFT positions with the intent to hire someone, it has fulfilled its obligation. Unfortunately, sometimes the positions are not filled. The Union believes that the intent of the provision is that for the Employer to achieve compliance it must actually hire



sufficient UFT employees to meet the 70% goal, not just post the openings. There is some support in the language for either interpretation. Therefore, the language is ambiguous.

Over the years, the parties developed partially informal methods to comply that worked reasonably well, despite the ambiguity of Subdivision 7. Toni Munos, System Director for Academic Resources, testified she is responsible for the workings of the hiring practices language for the Employer. She used to work with Bill Newton, a former Union staff person, now retired, trying to reconcile the data and assure that sufficient UFT faculty hires took place. T., Munos, tr. at 156-7; T., Newton, Tr. at 174 et. seq. Since Mr. Newton's departure, that System seems to have fallen into disuse. The previous practice appears to have relied in large part on trust and positive communication between the parties.<sup>3</sup> Instead, since at least 2010, the Union has filed a grievance each March to notify the Employer that it was not in compliance. Joint Exhibit 3.

Part of the difficulty in communication between the parties stems from the Employer's assumption that it had complied with the hiring practices language when it posted, with intent to hire, sufficient job openings to bring the System to 70% UFT faculty compliance. The Union argues that the Employer has not complied with the 70% requirement until it has actually hired the employees. This dispute makes a difference, because the System may have instances when a posting does not result in a hire. There is a basis in the language for the System's assumption that it need only estimate the number of positions it should post to reach the desired number of

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<sup>3</sup> Insofar as the evidence revealed, Ms. Munos and Ms. Cruz, successor to Mr. Newton for the Union, could not even agree about basic facts, such as what Ms. Cruz duties were when she previously worked for Ms. Munos. (*re*: hiring practices: Ms. Cruz: "I actually had quite a bit of involvement in putting in the numbers and pulling data to plug into the spreadsheet [employer data in the hiring practices process]". T. Cruz, Tr. at 37. *Compare*: Ms. Munos: "I don't recall involving Kari's into this process. This was something I involved Brian in and then I worked on it extensively myself." T. Munos, Tr. at 126.

hires, inform the Union that it has done so, and its obligation is met. This ambiguous provision states:

...and the number needed to insure seventy percent (70%) ... shall be the minimum number posted and hired. The posting of the required number of unlimited fulltime positions needed to be in compliance with the hiring practices above shall occur no later than March 31, to allow for filling at the start of the next academic year... The Office of the Chancellor and the MSCF will meet no later than May 1 to assure that the number of positions posted will bring the colleges into compliance...

Art. 20, Sec. 7, Subd. 2 B. (Emphasis provided.)

I am persuaded that the Union's interpretation of the language is the most reasonable in context. Posting is just an interim step on the way to hiring. The initial sentence of the hiring practices language provides that the System will insure that it "employs no less than seventy percent of the total [faculty] as unlimited full-time faculty...as calculated below". Art. 20, Section 7. Reading the initial sentence of Section 7 with the language underlined in Subd. 2B set out above, I find that the final step in compliance is hiring the employees, not posting job openings for them. It appears that the Employer has usually done an excellent job of predicting how many UFT employee openings it will need to post to meet its obligation under the hiring practices language. But to operate under the language in Subdivision 7, the System must not only accomplish the task of predicting how many UFT employee openings it must post, but it must also hire candidates for the positions it posted to comply with the intent of the provision as a whole. The Employer would be well advised to provide evidence of compliance to the Union when it has completed the process at the start of the academic year.

The Union's grievances regarding 70% compliance for the years 2010, 2012, and 2013 are denied. There is insufficient evidence to establish that the Employer did not meet its 70% goal by September of each year. For the year 2011, the Employer admits it was not in compliance at the beginning of the academic year, but the parties do not agree on an appropriate

remedy, as set out in the “Positions” sections above. Although it is difficult to craft a reasonable remedy for violation of this provision, the Union’s argument is the most persuasive: There is no point bargaining for a measurable benefit if the employer is allowed to ignore it. For 2011, it failed to meet the 70% UFT obligation, and it failed to request that the Union waive the requirement, an option provided by Subdivision 2B (last sentence quoted above).

For 2011, the 70% goal of full time equivalent employees UFT faculty members was 3,128 positions. There were postings to meet this goal, but the System fell short by 68 hires. The postings that year resulted in 22 “failed searches”; the Employer argues that the remedy for failure to hire sufficient UFT faculty should be 46 rather than 68, because based on postings, the System fell short by only 46. Er. Ex. 5. Because the hiring practices language as a whole favors the conclusion that 70% FTE positions should be measured by hires rather than postings, the appropriate number to consider for a remedy is 68.

“Hiring” 68 employees can include converting temporary employees who are teaching but are not in UFT status. The remedy, according to the Union is not a costly one because many employees who are already teaching a full time load are not UFT faculty. Based upon the Employer’s data for 2011-2103, Union Ex. 2 establishes that there are over 100 temporary employees working full time who are not in UFT status at just the five largest institutions. T. Cruz, Tr. at 35, *et. seq.* The Employer raises questions about the Union’s data, but has not provided sufficient evidence to contradict them. Looking at the System as a whole, with its several thousand employees, many faculty members who are currently teaching full time, could be converted to UFT faculty positions without any adverse actions to current employees. The System’s expert on administering the hiring practices language, System Director Munos, was asked about this possible remedy. Her testimony was that undertaking this remedial UFT hiring

was “not completely impossible” but that it would “create some challenges for us depending upon what the profile looks like of a current temporary part-time faculty member.” T. Munos, Tr. at 145-146. I take this to mean that the process could be time consuming, but could be accomplished, if necessary. Ms. Munos also acknowledged on cross examination that during the unique fiscal situation in 2011, the System could have requested a waiver from its obligation to meet the 70% requirement, but that it did not do so. This failure demonstrates a lack of attention to the labor-management interaction envisioned by the hiring practices language.

The Employer has significant concerns about the prospect of absorbing 68 remedial job status conversions and hires throughout its overall faculty complement of several thousand. It seeks mitigation, expressing fears that remedial hiring will adversely affect current UFT employees through layoff, or that teaching work does not exist to justify the remedy. Yet, at the hearing, there was insufficient evidence to establish that either of these fears would materialize if the remedy were ordered. The Employer’s concerns appears to be more about the nature of the public policy to which it bound itself years ago when it negotiated a provision with the Union ceding the Employer’s sole right to decide what sort of employees to hire. Should the Employer find that remedial hiring and conversions of existing employees does create problems for existing employees, other negotiated Contract provisions include tools for dealing with them.

Based on the forgoing, to compensate for the Employer’s failure to insure that it employed a minimum of 70% UFT faculty in 2011, I conclude that the Employer must immediately post and hire new or convert current faculty to fill a total of 68 unlimited full time positions. The remedial hiring is without regard to the status of the System’s compliance with the hiring practices language in fiscal year 2014.

## **AWARD**

The grievances for 2010, 2012, and 2013 are denied. The 2011 Grievance claiming that the Employer violated the Hiring Practices provision of Article 20, Section 7 is sustained. The remedy for falling short of its obligation to attain a goal of 70% unlimited full time faculty members for 2011 is to immediately post and hire new or convert currently employed faculty members for a total of 68 unlimited full time positions. The remedial hiring is without regard to the status of the System's compliance with the hiring practices language in fiscal year 2014.

Dated: June 10, 2014

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Andrea Mitau Kircher  
Arbitrator